

Internal Revenue Service

memorandum

CC:TL-N-1140-90

VWATERS

date: JAN 25 1990

to: District Counsel, Laguna Niguel W:LN
Attn: Susan C. Hergenhan

from: Senior Technician Reviewer
Tax Shelter Branch CC:TL:TS

subject: [REDACTED] - Validity of Statute Extension

This memorandum is in response to your request of November 2, 1989, regarding the above-mentioned subject.

ISSUE

Whether a designation of tax matters partner ("TMP") which does not comply with Temp. Treas. Reg. § 301.6231(a)(7)-1T is valid so that the "designated" partner may execute a valid statutory extension on behalf of himself and the other partners subject to the partnership proceeding?

CONCLUSION

A statutory extension executed by an improper party is not effective to extend the period of limitations on behalf of all of the partners. However, pursuant to I.R.C. § 6229(b)(1)(A), the statutory extension is valid with respect to the partner executing the extension.

FACTS

[REDACTED]'s taxable year began on [REDACTED]. The partnership filed its [REDACTED] U.S. Partnership Return of Income (Form 1065) on [REDACTED]. This return was signed on [REDACTED] by [REDACTED], as follows: "[REDACTED]." In the partnership materials, [REDACTED] is described as the managing partner employed to manage the affairs and business of the partnership. On [REDACTED], a Form 872-0 Special Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership was also signed by [REDACTED]. [REDACTED]'s signature appeared on the line provided for the TMP.

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At the time the consent was signed, [REDACTED] was not the general partner with the largest profits interest. Rather, [REDACTED] was the general partner with the largest profits interest at the end of the partnership's [REDACTED] taxable year. No written designation of TMP was filed with the Service.

DISCUSSION

The period of limitations for assessing tax to the partners from a change in the treatment of a partnership item is generally controlled at the partnership level. Pursuant to section 6229(a) the period for assessing any tax imposed by subtitle A attributable to partnership or affected items shall not expire before 3 years after the later of the date the partnership return was filed or the last day for filing such a return.

The period of limitations for assessment under section 6229(a) can be extended by an agreement pursuant to section 6229(b). Section 6229(b) provides:

(1) In general.- The period described in subsection (a) (including an extension period under this subsection) may be extended-

(A) with respect to any partner, by an agreement entered into by the secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before expiration of such period.

In this case, there was a Form 872-0 executed by [REDACTED] as TMP. In general, the TMP is the general partner¹ designated by the partnership in accordance with the regulations. See Temp. Treas. Reg. § 301.6231(a)(7)-1T. If a designation has not been made by the partnership, the TMP is the general partner having the largest profits interest at the close of the taxable year involved. In the event that the partnership does not designate a TMP and the Service determines that it is impracticable to apply the largest profits interest rule, the Service can select any partner as TMP. See Temp. Treas. Reg. § 301.6231(a)(7)-1T. Cf. Rev. Proc. 88-16, 1988-1 C.B. 691, section 3.03. [REDACTED] was

¹ We note that even though the regulations were issued after the Form 872-0 was signed, [REDACTED] was not the TMP under the statutory definition provided in section 6231(a)(7).

not the general partner with the largest profits interest, and there was no determination that it was impracticable to apply the largest profits interest rule. Consequently, the Form 872-0 executed by [REDACTED] as TMP is ineffective to extend the period of limitations for assessment with respect to all partners unless he was authorized by the partnership in writing to execute such an extension. I.R.C. § 6229(b)(1)(B).

The facts are not clear as to whether [REDACTED] was authorized by the partnership in writing to execute the extension. Temp. Treas. Reg. § 301.6229(b)-1T provides the requirements for such a person to extend the statute. The partnership must file a statement with the service center with which the partnership return was filed. The statement must: (1) provide that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners; (2) identify the partnership and person authorized by name, address and taxpayer identification number; (3) specify the partnership taxable year or years for which the authorization is effective; and (4) be signed by all persons who were general partners at any time during the year or years for which the authorization is effective. If [REDACTED] was authorized by the partnership in writing in accordance with Temp. Treas. Reg. § 301.6229(b)-1T, the Form 872-0 would be effective to extend the period for assessment with respect to all partners.


If a partner executes a statute extension as TMP on behalf of all partners of the partnership, a question arises as to whether the Service may raise equitable estoppel to prevent the partnership from claiming as an affirmative defense that the extension is invalid and the period of limitations for assessing partnership items has expired. Our office's previous position regarding an estoppel defense was that it could be used where: (1) a statement of fact was made which was otherwise unknown to the Service; (2) the Service reasonably relied on the statement of fact; and (3) the Service suffered a detriment by its reasonable reliance. Since the above defense can normally only be used against the person making the misstatement, in the context of a TEFRA partnership case, the partner other than a purported TMP would also have to make false statements (or at least fail to object when made aware of the false statement) in order for this doctrine to apply to them. See Piarulle v. Commissioner, 80 T.C. 1035 (1983). Cf. Barbados #7, Ltd. v. Commissioner, 92 T.C. 804 (1989) (estoppel may apply where Service is not informed of TMP bankruptcy, thus making reliance reasonable)(dicta).

Because of the numerous legal and factual problems with asserting the doctrine of equitable estoppel, we will no longer authorize the use of estoppel with respect to statute extensions executed by a partner signing as TMP. The person executing a

consent on behalf of a partnership must be the TMP in fact, or another person authorized pursuant to Temp. Treas. Reg. § 301.6229(b)-1T to extend the statute. Otherwise, the consent will not be effective to extend the period of limitations with respect to all partners.

Finally, we recommend defending the validity of the statute extension with respect to [REDACTED]. Although [REDACTED] was not authorized to extend the period of limitations on behalf of the partnership, he did have the authority to extend the period of limitations for himself as a partner in the partnership.² See I.R.C. § 6229(b)(1)(A). Consequently, the Service should pursue the litigation as it relates to [REDACTED] since the statute extension is valid.

If you have any additional questions regarding this matter, please contact Vada Waters at (FTS) 566-3289.


CURTIS G. WILSON

² In recommending defense of the validity of the Form 872-0 with respect to [REDACTED], we are not suggesting that 872-0 extension forms be used to extend the period of limitations for individual partners.